NOS._____ and _____

United States of America
Before the
Department of Commerce

WEAVER'S COVE, ENERGY, LLC,

Appellant,

v.

MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT,

Respondent.

MILL RIVER PIPELINE, LLC,

Appellant,

v.

MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT,

Respondent.

BRIEF FOR RESPONDENT

MARTHA COAKLEY
ATTORNEY GENERAL

CAROL IANCU
Assistant Attorney General
Environmental Protection Division
One Ashburton Place, Rm 1813
Boston, Massachusetts 02108-1598
(617) 727-2200 Ext. 2428

Counsel for Respondent

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INTRODUCTION

To avoid a statutory presumption of concurrence, the Massachusetts Coastal Zone Management Office ("MCZM") issued objections to the requests for federal consistency certification of Weaver's Cove Energy, LLC, and its affiliate, Mill River Pipeline, LLC, (collectively, "Applicants") for a proposed liquefied natural gas ("LNG") Project in Fall River, Massachusetts. The Applicants refused to agree to the stay of the review period that they initially requested, despite knowing that their refusals, at a time when there remained outstanding state permits, licenses, certifications, or other approvals (collectively, "state Permits"), would require MCZM to object.

The Massachusetts Coastal Zone Management Plan ("MCZMP") and Federal Consistency Procedures, at 301 C.M.R. § 21.00., *et seq*. as approved by the Secretary, prevent MCZM from issuing a concurrence until it has received all required state Permits. By insisting on an appeal at this stage, Applicants seek to have the Secretary supplant MCZM's consistency review with the Secretary's override review, thereby bypassing federal consistency review, which is the "cornerstone" of the Coastal Zone Management Act ("CZMA" or "Act"), 16 U.S.C. § 1451, *et seq*. The Secretary should decline this invitation.

The Applicants have not established that the Project is consistent with the objectives of the Act or otherwise necessary in the interest of national security. Nor could they, because, as the record shows, the Project is untenably unsafe and, due to the absence of state Permits, the full extent of adverse coastal effects remain unknown. The Secretary lacks sufficient information to conduct the balancing the override review process demands. Furthermore, an override in these circumstances would seriously jeopardize the integrity of the Act.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

In 1972, Congress enacted the Coastal Zone Management Act to provide funding for the development and implementation of state coastal zone management plans. *See* 16 U.S.C. § 1455; *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 391 (3rd Cir. 1987). "Congress thought the coastal zone 'was an important environmental resource,' that the existing regime of local land regulation was not protecting against 'enormous development pressures.'" *Connecticut v. United States Department of Commerce*, __ F.Supp.2d __, 2007 WL 2349894, at * 5 (D. Conn. Aug. 15, 2007) *quoting Norfolk Southern*, 822 F.2d at 393. Thus, at its inception, the main purpose of the Act was to protect land and water resources in the coastal zone. *See Connecticut*, at * 5 *citing* Joseph J. Kalo. et al, *Coastal and Ocean Law 3d* at 191 (2007); 16 USC §§ 1451,1452. Amendments to the CZMA clarified the role of competing interests, such as a national interest in siting energy facilities. However, "[e]ven though the CZMA has also incorporated development goals, it is, nevertheless, a balancing statute that seeks to balance conservation with commercial development." *Connecticut,* at *14.

The Act accomplishes this balancing through federal consistency reviews conducted by participating states. *See* CZMA, § 307, 16 U.S.C. 1456. *See e.g.*, M.G.L. c. 21A, §§ 2, 4A; 301 C.M.R. §§ 21.00 *et seq*. (MCZMP and Federal Consistency Procedures). "The CZMA federal consistency provision is a *cornerstone* of the CZMA program." 71 Fed. Reg. 789/2 (Jan. 5, 2006) (*emphasis added*).

The CZMA provides that non-federal entities proposing to conduct activities that require a federal license or permit and that will have coastal effects, are subject to CZMA's federal consistency review requirements set forth at CZMA, § 307(c)(3)(A), 16 U.S.C. 1456(c)(3)(A) and 15 C.F.R. § 930, subparts A, B, and D. Specifically, states must determine whether the proposed activity complies with the enforceable policies of the state's approved coastal management program and that the activity will be conducted in a manner that is consistent with its program. CZMA, § 307(c)(3)(A), 16 U.S.C. 1456(c)(3)(A).

NOAA has determined what necessary data and information must be submitted to the state to *commence* the state's six-month review period. 15 C.F.R. §§ 930.58(a), 930.60. However, NOAA has left it to each state to determine what other information it may require to *conduct* its review and determine consistency. *See* 15 C.F.R. § 930.63(c). Moreover, NOAA expressly recognizes that a state agency may require, before it can complete its consistency review, the receipt of all outstanding state permits, licenses or certifications. 71 Fed. Reg. 795/3; 301 C.M.R. § 21.07(3)(f) (Massachusetts regulations – approved by the Secretary – that require that it obtain all outstanding Permits before concurring to federal consistency).

A state must complete its review within six months or consistency is "conclusively presumed," unless the state and applicant mutually agree to stay the clock or extend the review period. CZMA, § 307(c)(3)(A); 15 C.F.R. §§ 930.62(a), 930.60(b). *See also, e.g.,* 301 C.M.R. § 21.07(3)(f). A state may object if it makes a determination that the activity will not be conducted consistent with its enforceable policies or if there are outstanding state permits, licenses or certifications that, under its approved plan, are required prior to it making a consistency determination. 15 C.F.R. § 930.63. *See*

also 301 C.M.R. § 21.07(3)(f). *See also* 71 Fed. Reg. 795/3. ("A State, at the end of the six-month review period may, of course, object if the applicant has not yet received the State permit.")

If the state objects, no federal permit or license may issue unless the Secretary "overrides" the state's objection. 16 U.S.C. § 1456(c)(3)(A).

B. Factual Background

Weaver's Cove seeks to construct and operate an LNG[1] import terminal on the east bank of the Taunton River in Fall River, Massachusetts, in conjunction with a proposal of its affiliate, Mill River Pipeline, LLC, to construct and operate two lateral pipelines to transport revaporized natural gas from the proposed terminal to existing interstate pipeline facilities.[2] Delivery of LNG to the proposed terminal and pipelines would be by way of LNG tankers through Mount Hope Bay and the Taunton River.

To accommodate the proposed tanker traffic and otherwise facilitate its Project, Weaver's Cove have proposed significant dredging activities. Weaver's Cove Appendix ("WC A") 15. For example, Weaver's Cove proposes dredging up to 2.6 million cubic yards of sediment in the federal

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[1]When cooled to roughly -260° F, natural gas condenses into a liquid, and its volume is reduced 600 times, which makes it feasible to be transported long distances via tankers. At an import terminal, the LNG is regasified before being distributed for use.

[2]The two lateral pipelines include over 6 miles of piping, portions of which will be installed in wetland areas that constitute waters of the United States and a portion will cross the Taunton River (collectively, "Pipeline Project" or "Mill River Project"). *See* Mill River Pipeline Brief ("MR Br.") at 1. The terminal facility would include a marine berth, an LNG storage tank, regasification facilities, a LNG truck distribution facility, construction of a jetty, and dredging and backfilling the Taunton River crossing for one of the pipeline laterals (collectively, "Terminal Project" or "Weaver's Cove's Project"). Weaver's Cove Brief ("WC Br.") at 1. Throughout this brief, references to "the Project" mean both the Pipeline Project and the Terminal Project, collectively.

navigation channel and turning basin, dredging and backfilling in association with installation of the lateral pipelines, and a significant amount of offshore disposal of dredged material. Applications for federal and state Permits related to various aspects of these dredging related activities are under review by the United States Army Corps of Engineers and the Massachusetts Department of Environmental Protection ("MassDEP").

The proposed transit route includes a roughly 3.3 nautical miles segment of the Taunton River, through the metropolitan Fall River and Somerset areas, which may be characterized as "narrow, winding and in close proximity to significant populations and infrastructure." Supplemental Appendix ("SA") 14, Encl.(1) at 8. In particular, the federal channel in this stretch of river lies within 500 to 1,000 meters of areas where the population density ranges from 1,000 to over 9,000 persons per square mile. SA 14, Encl.(1) at 11. It also includes three bridges, 2 of which (the old and new Brightman Street Bridges) are only 1,100 feet apart and not aligned, and one of which (the old bridge) only has a horizontal opening of 98 feet.[3]

In July 2005, FERC issued a conditional approval of the Project that made its operation contingent on the Coast Guard determining that the proposed LNG tanker route is suitable. SA 12, para. 14. *See also* WCA 3, Condition 75; Mill River Appendix ("MRA") 4, Condition 75; WCA 4, para. 44; MRA 5, para. 44. It also required "concurrence from [MCZM] that the project is consistent

[3]Initially, the old Brightman Street Bridge was supposed to be demolished upon completion of the new bridge. However, in August 2005, a federal law was enacted that prohibited the demolition of the existing Brightman Street Bridge (Pub.L. 109-59, §§ 1702 (project no. 4270), 1948). Thus, the original proposal to use large tankers, making 50-60 deliveries (100-120 transits) per year, was no longer viable because the large tankers would be too wide to fit through the old bridge.

with the Massachusetts Coastal Zone Management Program Plan." WCA 3, Condition 23; MRA 4, Condition 23.

In February 2006 and thereafter, the Applicants proposed changes to the operational plan of the Project, calling for the use of "smaller" LNG tankers (725 to 750 ft long, by 82 to 85 ft beam) that they contended could fit through the array of bridges in the key stretch of the Taunton River. *See e.g.,* SA 11, 14. The smaller tanker plan called for more than doubling the tanker traffic to 120-130 deliveries (240-260 transits) annually from what was originally proposed. *Id*.

On January 4, 2007, the Applicants submitted separate requests to MCZM seeking its concurrence with federal consistency certifications. WCA 1; MRA 1. The requests identified the various required state Permits that were still pending for the Project. *Id*.

On January 10, 2007, MCZM informed the Applicants that the six-month review period had commenced and that it would run until July 8, 2007. It also informed Applicants that MCZM "can not complete our review and issue a decision of consistency . . . until all applicable licenses, permits, certifications, and authorizations have been issued." This requirement was repeated to Applicants in numerous subsequent correspondence.[4] *See* WCA 2, 8; MRA 2, 8; SA 16.

On May 9, 2007, the United States Coast Guard issued a preliminary assessment ("Assessment") the proposed LNG project, finding that "the waterway may not be suitable for the

[4]Even prior to Applicants' formal initiation of MCZM's federal consistency review, MCZM had informed Applicants of this requirement numerous times either directly or through official filings. *See e.g.,* SA 1, 2, 3.

proposed type and frequency of LNG marine traffic."[5] SA 14, cover letter, at 2 (commenting that the current operational plan "presents navigation safety and security challenges and environmental impacts" beyond those presented by Weaver's Cove's original proposal). "In short, of the entire proposed transit route, the area of highest apparent potential consequence in the case of accident or incident – the Fall River/Somerset metropolitan area – is also the area of highest risk to navigation safety, and presents a unique challenge to water-borne security." SA 14, Executive Summary at 1. Coast Guard stated: "The sum of measures, mitigations and precautions described in the Weaver's Cove proposal do not appear to sufficiently reduce the risks to a point where the waterway could be declared suitable for the proposed cargo transit." *Id*.

On June 4, 2007, based on the serious concerns raised by the Coast Guard's Assessment, questioning the viability of the LNG Project and, therefore, the need for dredging, MassDEP decided to stay its technical review of some of the applications for state Permits pending before it. MassDEP concluded that given the likelihood of a negative suitability determination, it should await the Coast Guard's final determination. WCA 9; MRA 8. The First Circuit recently reached a similar conclusion based on the Assessment. *Fall River v. FERC,* 1st Cir., No. 06-1203 (and consolidated cases), (Oct. 26, 2007) *slip op.*, 11 (stating, based on the Coast Guard's Assessment, that "the project may well

[5]On October 24, 2007, the Coast Guard, in fact, issued its final determination, consistent with its preliminary assessment, declaring the waterway unsuitable. Because this document was not part of FERC's consolidated record at the time these appeals were filed, and at the instruction of NOAA's General Counsel, MCZM is separately moving, pursuant to 15 C.F.R. § 930.127(i)(4) and 15 C.F.R. § 930.130(a)(2), for the Secretary to supplement the decision record with the final determination.

never go forward" and for that reason, deemed an appeal of FERC's conditional approval not ripe for review until the Coast Guard acted).

On June 6, 2007, the Applicants requested a stay of MCZM's federal consistency review process to enable them to obtain outstanding Permits. SA 15.

On June 8, 2007, MCZM agreed and proposed a nine month stay. SA 16. The time period was intended to provide time for the Coast Guard to issue a final waterway suitability determination for MassDEP to complete its review of outstanding Permits, and for any administrative appeals to be completed.

Just days before expiration of the consistency review period, on July 2, 2007, the Applicants did an "about-face" and refused to agree to a stay that they had requested. SA 15, 16. As a result, MCZM had no choice but to issue its procedural objections on July 6, 2007 to avoid statutory presumption of concurrence. WCA 2; MRA 2.

On August 27, 2007, the Applicants commenced these appeals of MCZM's procedural objections.[6]

STANDARD OF REVIEW

The Secretary may dismiss an appeal for good cause. 15 C.F.R. § 930.129(a). The Secretary shall find that a proposed federal license or permit activity is consistent with the objectives or purposes of the Act or is necessary in the interest of national security "when the information in the decision

[6]MCZM's objections are in full compliance with Section 307 of the Act and the applicable regulations; and, the Applicants have not claimed otherwise. *See* 15 C.F.R. § 930.129(b) (threshold issue).

record" supports this conclusion. 15 C.F.R. § 930.130(d). "The appellant bears the burden of submitting evidence in support of its appeal and the burden of persuasion." 15 C.F.R. § 930.127(f). *See also Anton Decision* at 4; *Chevron Decision* at 4-5. "[W]ithout sufficient evidence, the Secretary will decide in favor of the State." *Mobil Oil Exploration* at 8, *quoting Anton Decision* at 4.

ARGUMENT

I. The Applicants Have Not Demonstrated that the Project is Consistent with the CZMA's Objectives; Nor Could they, Since the Project is Untenably Unsafe and Necessary Information is Lacking.

The Secretary may override an objection based on a state's inconsistency finding if he finds either that the proposed "activity is consistent with the objectives" of the Act "or is otherwise necessary in the interest of national security." 16 U.S.C. § 1456(c)(3)(A). To determine that a proposed activity is "consistent with the objectives or purposes of the Act," (ground I) the Secretary evaluates whether the proposed activity meets each of three elements:

> (a) The activity furthers the national interest as articulated in § 302 or § 303 of the Act in a significant or substantial manner,
>
> (b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively, [and]
>
> (c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program."

15 C.F.R. § 930.121.

As explained below, the Applicants have failed to demonstrate by a preponderance of the evidence that the Project meets each of these required elements; and, therefore, have not shown that the Project is consistent with the objectives or purpose of the Act. Moreover, for prudential reasons

discussed below, the Secretary should refrain from exercising his override authority here so as to preserve the integrity of the Act.

A. The Applicants Have Not Demonstrated that their Projects Further National Interest in a Significant or Substantial Manner.

The first element Applicants must show in demonstrating that the proposed activities are consistent with the objectives or purposes of the Act is that the Project "furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner." 15 C.F.R. § 930.121(a). To evaluate what constitutes furtherance of the national interest in "a significant or substantial manner," NOAA has identified the following considerations: "(1) The degree to which the activity furthers the national interest; (2) the nature or importance of the national interest furthered as articulated in the CZMA; and (3) the extent to which the proposed activity is coastal dependent." Coastal Zone Management Act Federal Consistency Regulations of 2000, 65 Fed. Reg. 77123, 77150 (Dec. 8, 2000).

The Applicants argue that one way in which the Project satisfies this element is "in siting major coastal-dependent energy facilities." WC Br at 7; MRP Br. at 7. The Applicants each contend their part of the Project is an "energy facility" "because it will provide significant energy supply to New England." WC Br. 8; MRP Br. 8. Weaver's Cove contends the Terminal Project is "a coastal dependent use" "because LNG will be delivered via ocean-going LNG ships that will berth and unload at the LNG terminal" (WC Br. 9), and Mill River contends the Pipeline Project is "a coastal dependent use" because it "must be located in the coastal zone" to deliver natural gas from the Terminal and "will

rely on deliveries of LNG by ship" (MRP Br. 9)(*quotation omitted*). Each also contends its Project is "major" due to its "value and capacity." WC Br. 8-9; MRP Br. 8-9.

The second way that Applicants claim the Project furthers the national interest is "by developing the resources of the coastal zone." WC Br at 7; MRP Br. at 7. Specifically, they claim it furthers an interest in "the development of the coastal zone" due to "the utilization of coastal resources for economic and industrial development." WC BR. at 9; at MRP Br. 9-10. The applicants contend their parts of the Project allow use of the coastal zone "for a particular purpose that was previously not available." WC Br. at 9 ("*i.e.*, the transit and berthing of vessels with a draft of up to 37 feet"); MRP at 10 ("the transportation of imported natural gas to meet growing regional demand"). And, Weaver's Cove also contends such development (*i.e.*, the siting of the LNG Terminal and associated dredging activities) in a designated port area ("DPA") is the type of development contemplated by the CZMA and MCZMP.[7] WC Br. at 10.

The Applicants contend these interests are furthered in a "significant and substantial way" because they expect the Project to have economic implications beyond the immediate locality in which it is located; because of the Project's magnitude, size, scope and importance as measured by economic value and delivery capacity; and because they expect benefits on a national scale – including, meeting

[7]Under the MCZMP, however, even water-dependent industrial uses may be prohibited in a DPA if they pose severe conflict with abutting neighborhoods. SA 19, at 66, Ports Policy #3 (stating "in cases where it is impossible to buffer existing residential areas from undue impacts, the plan may specify reasonable limitations on uses occurring within the DPA"). *See also* 301 CMR § 23.05(2)(e)2 (codifying this principle in municipal harbor plan regulations).

growing demand for natural gas, enhanced energy reliability, price competition, and environmental. WC Br. at 11-14; MR Br. at 10-13.

Based on the Coast Guard's Assessment, however, all this falls by the wayside. Because the Project is inherently unsafe, it is likely that it will not obtain the necessary approval ever to become operational. SA 14. If the waterway is deemed "unsuitable" and LNG tankers are prohibited, there will be neither "coastal-dependence" nor "development of coastal resources" that will serve any purpose whatsoever. Without tankers to deliver the fuel, there would be no increased energy supplies, no LNG storage or regasification, and no distribution by pipeline or truck. The Applicants will not meet their projections for increasing the region's gas supply needs by 2010 or at anytime in the foreseeable future. Unless and until the Coast Guard issues a "suitability" determination, the Project as conditionally approved, will not become operational,[8] and, therefore, will further no national interests. To allow federal authorizations of the construction of a Project whose operation is likely to be unlawful cannot possibly further national interests as it would result in degradation of coastal resources with no offsetting benefits whatsoever – which is antithetical to the CZMA's purpose.

The Applicants may argue it is premature to consider this dire outcome until appellate review of any final Coast Guard determination runs its course. However, the Secretary is bound to conduct his review on the record. *See* 15 C.F.R. § 930.130(d). And, the record here shows this outcome – that

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[8]Even if the Project could go forward, because the project is at odds with other national interests of § 302 and § 303, the Secretary must also give those other competing interests due consideration. For example, two other listed interests that may well be negatively impacted by the project are the "the protection of natural resources . . . within the coastal zone" and the "management of coastal development to . . . safeguard . . . the quality of coastal waters, and to protect natural resources and existing uses of those waters." 16 U.S.C. § 1452(2)(A) and (C).

the Project may well never go forward – is likely. SA 14. Therefore, the Secretary must consider it. *See e.g., Mobil Oil Exploration* at 40 (finding that a proposed one-well exploration would only make a "minor contribution to the national interest" because despite the potential for the discovery of a large quantity of natural gas, "there is a 90 percent chance that no hydrocarbons will be discovered at the site"). Similar to the Secretary's analysis in *Mobil Oil Exploration*, consideration of the high likelihood that the Project will not go forward means that any contribution to the national interest of the Project, is, at best, minor.

In addition to the Coast Guard's Assessment, others have voiced serious concerns about the Project's untenable unsafeness that the Secretary must consider *See e.g.,* SA 5 at 1 (testimony of Richard A. Clarke stating that the Project "would be exposing large segments of the public to horrific, but entirely avoidable, harm"); SA 6 at 5 (testimony of Fall River Police Chief stating "we lack the ability to eliminate a significant possibility of intentional breach and we cannot assure safe evacuation in the event of a breach"); SA 7 (testimony of one of the areas leading emergency response physicians describing the impossibility, region-wide, of coping with an accident or attack); SA 8, 9 (testimony of Fire Chiefs of Fall River and Somerset detailing location specific factors making evacuation and emergency response impossible). *See also* SA 4 (Sandia Report describing vulnerability of LNG tankers to terrorist attack and the probably consequences thereof). Certainly Congress did not intend to allow coastal development in a manner that puts the safety and security of thousands of people at risk up to 260 times a year.

While, CZMA Sections 302 and 303 broadly define national interests so that it tends to be "relatively easy for projects to satisfy the national interest requirement" (*Connecticut*, at *6), here, this untenably unsafe Project cannot even do that.

B. In the Absence of State Permits, Adverse Coastal Effects Remain Unknown, and, to Preserve the Integrity of the CZMA Scheme, the Secretary Should not Override MCZM's Objections.

The MCZMP is a "networked" program, meaning that the state enforceable policies are enforced through the regulations of the Permitting agencies. In other words, in most cases, the issuance of a state Permit indicates that the proposed activities may be conducted consistent with state laws that underlie the enforceable policies. Under the MCZMP, which the Secretary has approved, MCZM lacks legal authority to make a consistency decision until it has received all outstanding state Permits. 301 C.M.R. § 21.07(3)(f) ("MCZM's decision [to concur with or object to a federal consistency certification] shall be contingent on prior receipt of all other necessary state licenses, permits and certifications."). Further, Massachusetts law, as approved by the Secretary, also authorizes MCZM to "object to a federal consistency certification if applicable state licenses, permits or certifications have not been received at the close of its review time table." 301 C.M.R. § 21.07(3)(g).

Under this system, identification and evaluation of adverse coastal effects occurs during the state administrative review processes associated with requests for state Permits. But, here, those processes remain ongoing. *See* WCA 2; MRA 2. Until they are completed, and state Permits are issued that identify any necessary conditions, it is too soon to conduct the requisite balancing. *See Mobil Oil Exploration* at 12 *quoting Anton Decision* at 5, n.8 (holding that where the Secretary

cannot "adequately identify the adverse coastal zone effects of the activity" due to a lack of information, he "was unable to perform the weighing" and therefore could not find for the applicant on this element).

One of the outstanding state Permits that prevented MCZM from conducting its federal consistency review is illustrative. A dredging permit is needed under the Massachusetts Public Waterfront Act, M.G.L. c. 91 ("Chapter 91"), and 310 C.M.R §§ 9.40 *et seq*., to allow proposed dredging of the federal channel and a turning basin in the vicinity of the proposed terminal site. However, Chapter 91 only allows authorization of the minimal amount of dredging that is necessary for a proposed activity to be conducted. *See e.g.*, 310 C.M.R. § 9.40(3)(a). It is during the review of the application for a Chapter 91 permit that MassDEP evaluates what that amount is and conditions the activity accordingly, thereby establishing the limits of what the coastal impacts of that dredging will be.[9] Until that has happened, the extent of impacts of the approved dredging is unknown, and MCZM lacks information needed to review the consistency of the proposed activities to the state enforceable policies of the MCZMP.

Another example arises in the context of an outstanding water quality certification that is required in relation to certain dredging activities. *See* Massachusetts Clean Waters Act, M.G.L. c. 21, §§26-53, and regulations at 314 C.M.R. § 4.00, *et seq*., and 314 C.M.R. § 9.00, *et seq*. The Applicants contend that reliance on a "mixing zone" to meet required water quality standards is

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[9]This example highlights the significance of the Coast Guard Assessment and the reasonableness of MassDEP's decision to stay review of certain Permits to await its finalization. *See e.g., Fall River, slip op.* at 14 (when an agency determination depends on how other administrative processes will play out, it is prudent to wait for that to happen). If, as the record here supports, the waterway is not suitable for LNG tankers, then authorization of dredging activities and its impacts with no countervailing benefit, would vitiate the purpose of the Act.

sufficient. WCA 14 at 5; MRA 12 at 5 (FR 15). Use of a "mixing zone" would enable Weaver's Cove to evaluate the contamination levels caused by their dredging activities at some distance away from the actual activities, allowing for some dilution. The City of Fall River has disputed the applicability of a "mixing zone" in this context. Supp. App. Tab 17, at 5. Whether or not a "mixing zone" applies under the applicable state regulations, and, if so, what its size should be, are questions that must be resolved in the first instance by the state certifying agency, here MassDEP. That happens during MassDEP's review of the certification application, which remains ongoing.[10] (Under applicable state and federal regulations, MassDEP has until December 15, 2007 to act on that certification application.) Moreover, the "mixing zone" issue is just one of the many potential issues that MassDEP must evaluate and, if necessary, address through conditions it may attach to its certification.

The Applicants effectively concede this point by their reliance on other water quality certifications that MassDEP has already issued related to this Project. In arguing that its proposed measures to mitigate permanent impacts to intertidal habitat are adequate, Weaver's Cove offers as support that MassDEP has determined that "[w]ith the implementation of these measures and [the conditions set forth in the Water Quality Certification, MADEP] is satisfied that adequate measures have been taken to avoid, minimize and mitigate for the wetlands impacts." WC Br. at 23 (brackets in original). *See also* MRP Br. at 16 (relying on MassDEP's issuance of a water quality certification to support the point that the Project will be conducted in a manner that will not violate water quality standards). By reliance on MassDEP conditions and certifications, the Applicants effectively concede

[10]Weaver's Cove has challenged MassDEP's ongoing review. *Weaver's Cove v. MassDEP*, D.C. Cir., No. 07-1238 (pending).

that a conclusion as to adverse effects, cannot be had unless and until the MassDEP evaluates the proposed mitigation measures and establishes any and all conditions needed.

The point is this: the full range of adverse impacts will not be known until the state Permitting agency determines what the specific conditions on the proposed activities will be. It is only in that context that the adverse effects may be fully known, and it is up to the state agency – in these two examples, MassDEP – to determine in the first instance what those conditions will be. Because this had not yet happened, MCZM was not in a position to review the proposed Projects' consistency with state enforceable policies. And, for the same reason, the Secretary is not in a position to conduct the "weighing" necessary for this element. *See* Mobil Oil at 10 ("more information is necessary where the likelihood or the extent of impacts may be high").

Furthermore, an override in these circumstances would undermine the integrity of the Act. NOAA has expressly endorsed MCZM's approach here: "A State, at the end of the six-month review period may, of course, object if the applicant has not yet received the State permit." 71 Fed. Reg. 795/3. In fact, NOAA not only endorses, but *expects*, where state Permits have not yet been received, that the agency "may, of course, object" and should do so pursuant to 15 C.F.R. § 930.63(c), due to insufficient information. *See id.* Where NOAA's regulatory scheme expressly authorizes MCZM's procedural objections, a decision by the Secretary to then turn around and subject them to the override process would be hard, if not impossible, to square.

The Secretary has twice reviewed objections based on a lack of information: *LILCO Decision* and *Mobil Oil Exploration Decision.* Both times, however, the missing information involved various technical assessments, findings, reports, or the like, which a state demanded as necessary for its

consistency review. Those objections resulted from a dispute between the applicant and state over whether the information demanded by the state was, in fact, needed.[11] Quite differently, what is missing here are state Permits that are *required by law* before MCZM can complete its consistency review.

Moreover, the Applicants do not dispute that the outstanding Permits are needed; they have conceded that they are: "[M]CZM standard practice does not require submission of final state permits with an application for Federal Consistency review, *only that such permits be issued before it will complete its review*." WC.App. 12 at 36; MRP App. 14 at 36 (emphasis added). Unlike *LILCO* and *Mobil Oil* in which a substantive dispute over the need for specific information triggered the objections, here the trigger was the Applicants' impatience. *See* Statement of Facts, B, *supra*. As explained below, to override MCZM's objections in these unique circumstances would potentially jeopardize the integrity of the CZMA scheme.

The Secretary's review under Subpart H is on entirely different grounds than the state's review for consistency with its enforceable policies. *See* 71 Fed. Reg. 798/3 ("The Secretarial appeals process does not review whether the proposed activity is consistent with the State's enforceable

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[11]In *LILCO Decision*, New York demanded information related to effects of a nuclear power plant owned and operated by the applicant, even though the proposed activities for which the applicant sought consistency certification only involved dredging and jetty maintenance activities that it had been performing for nearly 20 years. *LILCO Decsion* at 1. The Secretary determined effects of the power plant were outside the scope of the limited activities for which certification was sought, and, based on the information available related to those activities, overrode New York's objection.

In *Mobil Oil*, North Carolina demanded a four-part fisheries study be completed before it could complete consistency review of a proposed one-well natural gas drilling exploration project in a biologically unique and highly productive area. *Mobil Oil* at iv. The Secretary agreed the study was necessary, and, on the merits, determined he could not perform the requisite "weighing" for the second element of ground I due to the missing information related to adverse effects. *Mobil Oil Exploration Decision* at 12.

policies, but is a *de novo* consideration of whether a proposed activity is consistent with the objectives of the CZMA or otherwise necessary in the interest of national security."). *See also Anton Decision* at 3; *Chevron Decision* at 5. Indeed, if Secretarial review takes place without a state ever having conducted a full consistency review, then, it is quite possible it never will: If the Secretary finds grounds exist to override, then the federal authorizations may issue, thereby effectively bypassing the Act's "cornerstone" program.

The absurdity of this outcome becomes even clearer by stepping back to realize that it is the applicant who would control which path to take (*i.e.*, state consistency review or Secretarial review). The regulations allow a stay of the six-month review period only upon mutual agreement between the state agency and the applicant. 15 C.F.R. § 930.60(b). In light of the statutory presumption of concurrence, all an applicant needs to do to skirt state consistency review – under this absurd approach – would be to refuse a stay, thereby forcing the state to issue a procedural objection, which the applicant could then seek to have reviewed on grounds of the project's importance regardless of consistency. The regulations clearly are not intended to give the applicant this power essentially to opt-out of consistency review. To avoid this absurd result, the Secretary should refrain from overriding MCZM's objections.

At least 17 other coastal states and one territory also require receipt of all state permits, licenses or other approvals before concluding their federal consistency reviews.[12] Therefore, an

[12]The following states and territory have this requirement: California, Connecticut, Delaware, Florida, Georgia, Hawaii, Louisiana, Maine, Maryland, Michigan, Mississippi, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Washington and American Samoa. (Five of these coastal states allow concurrence to be issued, but it is not valid until outstanding Permits are obtained: Delaware,

override here, on objections based on missing permits, would potentially open the door to impatient applicants in at least these 17 other coastal states and one territory. The potential to undermine the "cornerstone" of the Act is tremendous.

The objective of the Secretarial override process is to ensure implementation of the Act "in a manner which *strikes a balance* between" the need to ensure consistency of federally authorized activities with a state's approved enforceable policies and the potentially overriding importance of the proposed activities. 15 C.F.R. § 930.1(b) (emphasis added). However, where outstanding state Permits and impatient Applicants have prevented consistency review from taking place, there is nothing for the Secretary to balance the "importance" of the proposed project against. The Act and regulations contemplate Secretarial review to override an objection, where appropriate, *despite* an inconsistency finding or *despite* a state's refusal to make such a finding, not *instead of* a state ever having an opportunity to conduct a review.[13] The latter would result should the Secretary override MCZM's objections here.

Rather, he should let MCZM's objections stand and, if and when the outstanding state Permits are issued, the Applicants could return to MCZM and allow it to conduct its federal consistency review of their Projects. If, after such a proper review, an object were to result, then at least the Secretary would have a proper record on which to conduct his review.

Hawaii, Maine, Ohio and Oregon.)

[13]To the extent the Secretary views such a procedural objection as tantamount to an inconsistency finding, that position is flawed in that it fails to take into consideration the statutory presumption and right of the applicant to essentially force a procedural objection. Moreover, it is only the issuance of the outstanding Permits that can demonstrate consistency. See Argument III, B., infra.

C. The Applicants Have Not Demonstrated that National Interests Furthered by the Project, If Any, Outweigh the Project's Adverse Coastal Effects; Nor Could They At this Time, Due to the Absence of State Permits.

To meet their burden that the proposed activities are consistent with the objectives or purposes of the Act, the Applicants must also show that national interests furthered by the Project outweigh its adverse coastal effects, when those effects are considered separately or cumulatively. 15 C.F.R. § 930.121(b). "An absence of adequate information in the record inures to the State's benefit because such an absence would prevent [the Secretary] from making the required findings." *Mobil Oil Exploration* at 8.

The Applicants argue that the national interests furthered by the Project – if any (*see* Argument I.A, *supra*) – outweigh any adverse coastal effects because they claim that any adverse coastal effects will be "insubstantial in magnitude and temporary in effect" or mitigable. WC Br. 14; *see* MR Br. 14 ("insignificant and of very short duration"). For example, Weaver's Cove concedes there will be adverse impacts to winter flounder egg and larvae (WC Br. at 17), but argues that the record demonstrates time of year dredging restrictions and other measures, will "eliminate the *majority* of indirect winter flounder impacts associated with dredging." WC Br. at 18 *quoting* FEIS at 4-106 (*emphasis added*). Similarly, Mill River argues that the "*majority*" of the secondary impacts from the loss of vegetation (*e.g.*, loss of wildlife habitat or erosion) would be minor and temporary. MRP Br. at 20 *quoting* FEIS at 4-93 (*emphasis added*).

The Court in *Connecticut v. Department of Commerce* rejected similarly indefinite findings of the Secretary. *See e.g., Connecticut* at *9-13. For example, that Court rejected the Secretary's

conclusion that impacts to shellfish beds were temporary by ruling that his reliance on the fact that recovery would take "*at least* 3 to 5 years" did not support a determination that the shellfish beds would, in fact, ever *actually* recover, but rather that, *if they did*, it would not be for at least 3 to 5 years. *Connecticut,* at *12.

Applying the *Connecticut* Court's logic here, all Weaver's Cove says is that at least 51% of winter flounder impacts will be eliminated – which leaves as much as 49% of the impacts unaccounted for by the proposed mitigation measures. Similarly, even acceptance of Mill River's proposition regarding secondary impacts as true, it means that up to 49% of the secondary impacts may well *not* be minor or temporary. Under *Connecticut,* such indefinite statements are not enough.

Yet, this is all that the Applicants have to offer. Weaver's Cove also argues that re-suspension of sediments would have only spatially and temporally limited impacts; it states "that suspended sediments and increased turbidity associated with dredging would be a short-term effect limited *primarily* to the time periods and areas when and where dredging would be conducted. . . . Sediment concentrations *would be expected* to return to background levels within about 1,600 to 2,300 feet of dredging operations." WC Br. at 19 *quoting* FEIS at 4-70 *(emphasis in original omitted; emphases added*). Equally "tautological and meaningless," (*see Connecticut,* at *12), Weaver's Cove argues "any elevated concentrations of dissolved contaminants resulting from dredging activities '*would be expected* to return to background levels within about 600 feet of the dredging operation.'" WC Br. at 20 *quoting* FEIS at 4-99 to 4-100 (emphasis added).[14]

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[14]Weaver's Cove's statements about "[a]dditional studies" do not salvage this failure. WC Br. at 20.

Likewise, Mill River argues that impact on fish and other organisms "is *expected* to be localized and short term;" in-stream turbidity levels are "*expected* to decrease" rapidly after construction; suspended sediment concentrations "*would be expected* to return" to preconstruction levels "*soon* after construction;" and soil contamination from construction equipment "would *typically* be minor." MR Br. at 20-21 *quoting* FEIS at 4-113, 4-14 (*emphases added*).

An impact that is *"primarily"* limited to a certain time period, may well occur at other times. And, an "*expect[ation]"* that sediment concentrations will return to background, or "*decrease*" rapidly or soon is not sufficient proof to support a finding that, *indeed*, they *will* or *when* they will. None of these "vague and indeterminate" (*see Connecticut* at *13) statements are "definitive" enough to support the findings and conclusions being proffered. *See e.g., Connecticut* at *12 (rejecting the Secretary's conclusion that recovery of anchor scars "*could"* occur within a year as saying "nothing definitive about the duration" of the associated adverse coastal effects). Thus, even as to the adverse coastal effects to which the Applicants concede will occur, they have failed to present evidence to support a conclusion that such effects are insignificant, temporary, or mitigable.

Applicants' analysis also fails to address concerns raised by NOAA's National Marine Fisheries Service. SA 10. As an example, NMFS has raised concerns that proposed Project "has not identified methods to avoid and minimize adverse effects to downstream migrations of anadromous fish." *Id*. at 3. NMFS believes anadromous fishery resources "need protection between June 15 and October 31." *Id*. Currently, FERC's conditional approval only requires protection through May 31, and, informally, Applicants have offered (but not even committed) to include protections only through July 31. WCA 1, Exh. F., at 3-4, 12-13 (Weaver's Cove conceding its mitigation proposal is different

from measures previously recommended by several agencies). Thus, the Projects leave these impacts to anadromous fish wholly unaddressed during their fall downstream migration. NMFS also has noted that the Applicants "should account for the interactive and additive impacts resulting from the use of multiple dredges and the anticipated levels and extent of suspended sediments." *Id*. at 3.

The Massachusetts Division of Marine Fisheries has also expressed concerns about adverse coastal effects. SA 13. MarineFisheries concluded that the Supplemental Environmental Impact Report "does not resolve the numerous and substantial environmental concerns" that it and others had expressed. *Id*. at 1. For example, it notes that the magnitude of likely impacts to shellfish beds are unknown so that a proper evaluation of compensatory mitigation is premature (*id*. at 3), that time of year restrictions are required even for fish species not in low abundance (*id*. at 2), and that there are insufficient data to support the estimates from modeling efforts of the range and magnitude of negative impacts to marine species (*id*. at 1-2).

Thus, Applicants offered a dredging mitigation proposal (WCA 1, Exh. F) that does not address all agency comments (*id*. at 1, n.1), but rather only offers compromises that have not yet been finalized (*id*. at 12-13). In other words, many significant concerns remain open and unresolved; Applicants have not established adverse effects will be insignificant, limited spatially or temporally, or mitigated. On this record, the Secretary should "decide in favor of [MCZM]." *See Mobil Oil Exploration* at 8, *quoting Anton Decision* at 4.

D. Because MCZM Considers Possible Alternatives During its Substantive Consistency Review Process, After All State Permits are Obtained, It is Impossible to Determine At This Time Whether Reasonable Alternatives Exist.

The third required element, that there is "no reasonable alternative available which would permit the activity to be conducted in a manner consistent with [state] enforceable policies" (15 C.F.R. § 930.121(c)) is equally misapplied and premature in the absence of state Permits as evaluation of adverse coastal effects is. If MCZM could not conduct its consistency review as to the Project at hand due to outstanding necessary Permits, it is absurd to argue, as the Applicants do (*see* WC Br. at 26; MRP Br. at 24), that MCZM should have conducted such a review as to reasonable alternatives.

At the appropriate time, if and when MCZM has obtained all requisite Permits, it will then, if necessary, evaluate any reasonable alternatives, including the relevance of the two offshore LNG facilities, Northeast Gateway and Neptune and the Maritimes pipeline expansion, all of which are projected to be on-line between 2008 and 2009 (*see* Argument II, *infra*), and any others.

II. The Applicants Have Not Demonstrated the Project is Are Necessary in the Interest of National Security; Nor Could they, Since the Project, in Fact, Would Impair National Security.

A proposed activity is "necessary in the interest of national security" (ground II) "if a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed." 15 C.F.R. § 930.122. In reviewing national security issues, the Secretary gives considerable weight to the views of the Department of Defense or other interested federal agencies. 15 C.F.R. § 930.122. Further, it is incumbent upon the Secretary to "seek information" on whether proposed activities directly support national security objectives. *Id.*

Here, the Coast Guard – which is under the Department of Homeland Security – has issued an Assessment expressing a strong likelihood that it will ultimately determine the proposed transit route to be unsuitable for the proposed LNG traffic. *See* SA 14, Encl(1), at 8-12. *See also* n.5, *supra* (noting the recent issuance of the Coast Guard's final assessment). The Coast Guard Assessment is squarely within the ambit of 15 C.F.R. § 930.122. As such it is due considerable weight.

The Applicants argue the Project is "necessary in the interest of national security" because it "will enhance domestic energy security by providing increased supplies of natural gas to the New England region" and also "by diversifying natural gas infrastructure in the United States." WC Br. at 27; MR Br. at 25 (citing general statements of the Department of Interior and a Senate Committee stating that energy diversification is in the interest of national security).

Under the Secretary's precedents, these generalizations, even if true, are insufficient. General statements that a project furthers or is important to the national interest fail to satisfy the requirements of a specific and significant impairment. *See e.g., Millennium Pipeline*, Dec. 12, 2003 at 39, *aff'd, Millennium Pipeline Co., v. Secretary of Commerce*, 424 F.Supp.2d 168, 179 (D. D.C. 2006). The Applicants present no evidence, or even argument, that if their projects do not go forward "significant impairment" of national defense or security interests will result. Under the Secretary's precedents, without a showing of "significant impairment," the national security ground for overriding an objection is not met.[15]

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[15] *See e.g.*, *Chevron Decision,* Jan. 8, 1993 (finding ground II requirements were not met despite findings of National Security Council, Minerals Management Service, and Department of Defense that increased production of oil and gas would be in the interest of national security); *Mobil Exploration and Producing*, Jan. 7, 1993 (finding ground II requirements not met because findings of

Applicants also claim the Project benefits national security by bringing LNG infrastructure to New England when "most new LNG terminals are being sited in the Gulf of Mexico" and are subject to the risk of major disruption due to hurricane activity. WC Br. at 28-29; MR Br. at 26. However, since FERC conditionally approved the Project, two offshore LNG facilities, roughly 10 and 13 miles off the coast of Gloucester, Massachusetts, have been approved by the United States Maritime Administration, and one is already under construction.[16] The Neptune (Suez LNG) and Northeast Gateway (Excelerate Energy) offshore facilities will bring an estimated 400-700 mmcf/d and 500-600 mmcf/d of natural gas to the region, respectively, beginning as early as 2008 for Northeast Gateway and 2009 for Neptune, which is a full two to three years ahead of even when this Project was originally proposed to be operational. Also under construction is a pipeline expansion project estimated to bring an additional nearly 800 mmcf/d to the region from Canaport LNG in Canada by late 2008.[17] Factoring these three viable projects into the equation demonstrates that even the mere generalizations of Applicants regarding the importance of their Projects are overstatements that do not reflect the reality of the situation.

In reality, even Applicants' generalizations are untrue. The Project is untenably unsafe and, based on the Coast Guard's Assessment, may well never become operational. *See* 33 C.F.R. §

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federal agencies fail to establish significant impairment).

[16]*See* http://www.marad.dot.gov/DWP/LNG/deepwater_ports/index.asp (Neptune licensed March 26, 2007; Northeast Gateway licensed May 14, 2007 and commenced construction May 27, 2007).

[17]*See* http://www.ferc.gov/docs-filing/elibrary.asp (Docket No. CP06-335-); http://www.mnpp.com/USA/new.htm (Maritimes & Northeast Pipeline, Phase IV Project, construction commenced and in-service date is fourth quarter of 2008).

127.009 (requiring Coast Guard approval of proposed marine LNG traffic); WCA 3 at 40, para. 112; MRA 4 at 40, para. 112 ("The Weaver's Cove LNG terminal cannot be placed in service without the approval and operational oversight of the Coast Guard"); WCA 3, Condition 75; MRA 4, Condition 75 (conditioning operation on annual assessment of "waterway suitability"). Unless and until the Coast Guard issues a finding that the waterway is "suitable," as a matter of law, LNG vessels will be prohibited from transiting the Taunton River. Until that happens, there will be no LNG deliveries from overseas; there will be no LNG to store or regasify; there will be no LNG to transport through pipelines; and there will be no LNG to truck to peakshaving storage facilities. Thus, without a finding of "suitability," there will be no increased energy supplies or diversification of natural gas infrastructure.

In fact, far from being "necessary in the interest of national security," the Project, if it were to ever become operational, would impair national security. The Coast Guard Assessment has found the portion of the proposed transit route in closest proximity to densely populated areas (*i.e.*, the area of highest potential consequence in the event of accident or incident) "is also the area area of highest risk to navigation safety, and presents a unique challenge to water-borne security." SA 14, Encl(1), at 1. In particular, the Coast Guard has found that "[r]epeatable safe transits are dependent upon the highest probability of success" for each of at least 17 risk factors, using highly challenging maneuvers, in a limited set of acceptable environmental conditions (weather, tide, wind, visibility, etc.) *Id*. at 8-12. *See also*, Argument, I.A, *supra*; SA 4-9. A project this unsafe cannot possibly be "necessary" in the interest of national security.

To suggest this unsafe Project is consistent with what Congress had in mind when enacting CZMA defies logic. The CZMA seeks to balance coastal development with the protection of natural

resources and, certainly neither should be done in a manner that puts public safety and welfare at risk. Moreover, FERC's approval of the Project is also conditioned on approval of acceptable emergency response plans, which, based on this record, is questionable at best. *See* SA 4-9.

To the extent the Applicants attempt to dismiss the Coast Guard's preliminary Assessment as being limited to navigational or maritime safety and unrelated to "national security,"[18] they would be at odds with the Coast Guard's view of its role. As Admiral Thad Allen, Commandant of the Coast Guard, recently explained: "My doctrinal belief is that stewardship, security and safety are not severable, they are interwoven in our mission mix, and the country is not well served by separating them." Address, Washington, D.C. Propeller Club, Sept. 19, 2007, at 2.[19] Quoting a "very senior Captain in the Coast Guard," Admiral Allen further stated: "The Coast Guard fabric draws its strength from the interlocking fibers of safety, security and stewardship, all fastened closely and firmly together. When the fabric is woven tight it provides strength and support beyond the collective weight and durability of the independent threads. Separate the fibers and the fabric unravels, weakens and fails to protect." *Id*. at 23-25.

Further, in a recent report, the Coast Guard reiterated: "Today, as in the past, our safety, security, and stewardship program goals and authorities to act are inextricably linked." Enhancing the

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[18] *See* Joint Reply of Weaver's Cove, LLC and Mill River Pipeline, LLC in Opposition to Respondent's Expedited Motion for Further Enlargement of Time.

[19] *See* http://homeport.uscg.mil/cgi-bin/st/portal/uscg_docs/MyCG/Editorial/20071012/-ADM%20Allen%20Speech%20to%20Washington,%20DC%20Propeller%20Club%20_5.pdf?id=9-0e4c8b26ac152afd8b0d6a49ff0ca64a0aff318.

Coast Guard Marine Safety Program, Sept. 25, 2007, Exec. Summary, at 4.[20] Thus, if Applicants attempt to draw a sharp distinction between navigational safety and national security in this case, they are running afoul of the Coast Guard's view of its own mission and authorities. The agency's view controls.

Moreover, the LNG tankers at issue are all coming from overseas, carrying LNG from foreign countries. National security is typically defined in relation to issues of national defense and foreign relations. Given the foreign origin of the LNG and these ocean-going vessels, it would be absurd for Applicants to suggest (*see* n.18, *supra)* that the potential for the Coast Guard to exercise its authority over them is strictly a local issue. As the Taunton River and the surrounding cities are part of the nation, broader security implications associated with the Coast Guard Assessment may not be so cavalierly written-off. Further, as a matter of common sense, a project that is likely to be declared too unsafe to go forward, cannot be "necessary" for national security; but, rather, it indeed could – and would – impair it.

To date, the Secretary has never overridden an objection solely on a finding that a project is necessary in the interest of national security; and in light of the Coast Guard's Assessment regarding the likely unsuitability of this waterway for this Project, this is certainly not such a case.

CONCLUSION

For the foregoing reasons, the Secretary should decline to override MCZM's objections.

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[20] *See* http://homeport.uscg.mil/cgi-bin/st/portal/uscg_docs/MyCG/Editorial/20071012/-Marine%20Safety%20Plan_3.pdf?id=c8d883341f9057f55c4ed1f-96c57236ee1427a34.

Respectfully submitted,

MASSACHUSETTS OFFICE OF
COASTAL ZONE MANAGEMENT

By its attorney,

MARTHA COAKLEY
ATTORNEY GENERAL

By: Carol Iancu
Assistant Attorney General
Environmental Protection Division
Office of the Attorney General
One Ashburton Place
Boston, MA 02108
Tel. (617) 727-2200, ext. 2428

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2007, I served a hard copy and electronic copy of the foregoing brief and supplemental appendix by first-class mail, postage prepaid, and sent courtesy copies of the brief by email and facsimile to the following:

Bruce F. Kiely
G. Mark Cook
Adam J. White
Baker Botts, LLP,
1299 Pennsylvania Ave., NW
Washington, DC 20004

Ralph T. Lepore, III
Dianne R. Phillips
10 St. James Avenue
Boston, MA 02116

Carol Iancu